Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

ALFRED S. HAYWARD, Personal Representative of the Estate of Delbert Lewis Hayward, Deceased,

Petitioner,

v.

VALLEY VISTA CARE CORPORATION, a non-profit corporation, d/b/a Valley Vista Care Center; SCOTT F. BURPEE and JAN BURPEE; JACK'S PHARMACY INCORPORATED; JACK BOTTS; CHAD BROWN and NANCY RENFREW; JERROLD E. PARK, and RICHARD K. THURSTON, M.D., Co-Personal Representatives of the ESTATE OF W. DYCE THURSTON, M.D.,

Respondents.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

SUPPLEMENTAL APPENDIX

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APPENDIX K

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

ALFRED S. HAYWARD, Personal Representative of the Estate of Delbert Lewis Hayward, Deceased, Plaintiff, vs. VALLEY VISTA CARE CORPORATION, a non-profit corporation, d/b/a/ VALLEY VISTA CARE CENTER, SCOTT F. BURPEE and JAN BURPEE; JACK'S PHARMACY INCORPORATED; JACK BOTTS; CHAD BROWN, NANCY RENFREW, JERROLD E. PARK and RICHARD K. THURSTON, M.D., Co-Personal Representatives of the Estate of W. Dyce Thurston, M.D., Defendants.	Case No. CV-97-00065 SUMMARY JUDGMENT OF DISMISSAL OF ALL CLAIMS OF DEFENDANTS, VALLEY VISTA CARE CORPORATION, SCOTT F. BURPEE, JAN BURPEE, NANCY RENFREW; AND JERROLD E. PARK AND RICHARD K. THURSTON, M.D., CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF W. DYCE THURSTON, M.D. (Filed Jun. 24, 1999)

On June 18, 1999, this Court entertained oral argument on Defendants, Valley Vista Care Corporation, Scott

F. Burpee, Jan Burpee and Nancy Renfrew (Valley Vista) and the Estate of W. Dyce Thurston's Motions for Summary Judgment of all of Plaintiff's claims, filed pursuant to Idaho Rule of Civil Procedure 56(c). Based upon the pleadings, affidavits and documents already on file in this matter, and further considering the oral argument presented, the Court entered its Order as follows:

That all of the Plaintiff's claims in Plaintiff's Second Amended Complaint are hereby dismissed as to Defendants, Valley Vista Care Corporation, Scott F. Burpee, Jan Burpee and Nancy Renfrew (Valley Vista) and the Estate of W. Dyce Thurston.

NOW, THEREFORE, the Court enters judgment against the Plaintiff, and in favor of Defendants, Valley Visa Care Corporation, Scott F. Burpee, Jan Burpee and Nancy Renfrew (Valley Vista) and the Estate of W. Dyce Thurston, as to all claims now before or pending with the Court, and further dismisses the said Defendants with prejudice, from this action.

DATED this 22nd day of June, 1999.

/s/ _____
HONORABLE
CRAIG C. KOSONEN

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of June, 1999, I caused a true copy of the foregoing SUMMARY JUDGMENT OF DISMISSAL OF ALL CLAIMS OF DEFENDANTS, VALLEY VISTA CARE CORPORATION, SCOTT F. BURPEE, JAN BURPEE, NANCY RENFREW;

JERROLD E. PARK AND RICHARD K. THURSTON, M.D., CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF W. DYCE THURSTON, M.D. to be served by the method indicated below, and addressed to each of the following:

Sandra G. Cody Attorney at Law 408 Sherman Avenue #307 Coeur d'Alene, Idaho 83814	(X) ( ) ( ) ( )	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Facsimile
Richard C. Eymann Attorney at Law 14th Floor Paulsen Center Spokane, WA 99201-0495	(X) ( ) ( ) ( )	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Facsimile
E. L. Miller Paine, Hamblen, Coffin, Brooke & Miller, LLP P. O. Box E Coeur d'Alene, Idaho 83816-0328	(X) ( ) ( ) ( )	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Facsimile
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Andrew P. Doman Christensen & Doman, P.C. 907 Main Avenue St. Maries, Idaho 83861	( ) (X) ( ) ( )	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Facsimile

/s/ _____
~~ANDREW P. DOMAN~~
Deputy Clerk

APPENDIX L

IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR
THE COUNTY OF BENEWAH

ALFRED S. HAYWARD, PERSONAL REPRESENTATIVE OF THE ESTATE OF DELBERT LEWIS HAYWARD, DECEASED, Plaintiff, vs. VALLEY VISTA CARE CORPORATION, a non-profit corporation, d/b/a VALLEY VISTA CARE CENTER, SCOTT F. BURPEE and JAN BURPEE; JACK'S PHARMACY INCORPORATED; JACK BOTTS; CHAD BROWN and NANCY RENFREW, JERROLD E. PARK and RICHARD K. THURSTON, M.D., Co-Personal Representatives of the ESTATE OF W. DYCE THURSTON, M.D., Defendants.	CASE NO. CV-97-00065 MEMORANDUM OPINION AND ORDER RE: MOTION FOR RECONSIDERATION (Filed Oct. 7, 1999)

Personal representative brought action on behalf of decedent's estate against nursing home and others for breach of contract, and Court granted nursing home defendants' motion for partial summary judgment dismissing action as one being in tort for professional negligence rather than for breach of contract, with such cause of action being personal to decedent and ruling that it died with the decedent. Plaintiff's motion to amend complaint to add a cause of action for wrongful death *denied*, such cause of action being barred by expiration of statute of limitations, with relation back doctrine of I.R.C.P. 15(c) not applicable.

Sandra G. Cody, Coeur d'Alene, attorney for plaintiff.

Andrew P. Doman, CHRISTENSEN & DOMAN, St. Maries, Idaho, attorneys for defendants Valley Vista Care Corporation; Scott and Jan Burpee.

SYNOPSIS

The Court orally pronounced its ruling denying plaintiff's motion to reconsider its order granting summary judgment dismissing plaintiff's claims against defendants Valley Vista Care Corporation, Scott F. Burpee and Jan Burpee at oral argument on motion, but reserved ruling with respect to issue whether the order granting summary judgment as to "all claims" of plaintiff embraced a cause of action for wrongful death. Plaintiff had moved to amend his complaint to add such a cause of action, but although the motion was noticed for hearing it was never argued to the Court, the energies and attention

of the parties being directed to the issue of plaintiff's entitlement to punitive damages. Counsel were in disagreement regarding a supposed stipulation for submittal to the Court on the written record. The Court recalls no such stipulation, and none is reflected in the record.

The motion for leave to amend is, again, not actually noticed before the Court but, in the interest of justice, and because the issue is essentially raised in plaintiff's motion to reconsider the summary judgment dismissal of all claims against the moving defendants, the Court will here address the claim.

For the reasons to follow, the Court finds that (1) the first complaint alleged that tortious conduct of defendants occasioned the wrongful death of the decedent; (2) the initial complaint, brought by the personal representative on behalf of the estate of the decedent, sought damage personal to the decedent and, although styled in breach of contract, was really in the nature of professional negligence or malpractice, i.e., tort; (3) the first complaint was filed within the time allowed by the statute of limitations for bringing a wrongful death action; (4) the first complaint sought no damages to the heirs or any other plaintiff proper to a wrongful death action; (5) the first complaint was not brought by the personal representative on behalf of the heirs; (6) although the personal representative is, additionally, himself an heir, he did not sue as an heir but as the representative of the estate; (7) the real party in interest in the first cause of action was the estate of the decedent; (8) the real party in interest in a wrongful death action is an heir or the heirs; (9) the motion to amend to add a claim for wrongful

death was filed after expiration of the statute of limitations for bringing an action for wrongful death; and (10) the amended pleading, if allowed, would not relate back to the timely filing of the first complaint since a new party appears, i.e., the heirs of decedent, and an action by them for wrongful death is time-barred.

DISCUSSION

Much of the rationale for the holdings set forth in the synopsis above is self-evident. If it were not disclosed that the decedent victim of the tortious conduct alleged in the original complaint had died, one would interpret that complaint from a reading thereof as one brought by that person himself for damages personal to him. An action for pain and suffering does not survive the death of the injured. I.C. 5-310, 5-311; *Bulk v. Haley,* 112 Idaho 855, 736 P.2d 1309 (1987). Idaho's Wrongful Death Statute, I.C. 5-311, does not authorize an action for surviving rights of pain and suffering of the plaintiff's decedent. *Bulk v. Haley, supra.*

The plaintiff is [sic] this case had always simply been "Alfred S. Hayward, Personal Representative of the Estate of Delbert Lewis Hayward, deceased," and no reference in the caption, factual allegation of the complaint, or prayer for relief ever contemplated a cause of action on behalf of the heirs. It made no mention of or claim to those damages which are traditionally, exclusively the entitlement of the surviving heirs of a decedent whose death was occasioned wrongfully. I.C. 5-311 reads in pertinent part as follows:

> **Suit for wrongful death by or against heirs or personal representatives – Damages.** – 1. When the death of a person is caused by the wrongful act or neglect of another, his . . . heirs *or personal representatives on their behalf* may maintain an action for damages against the person causing the death. . . . (emphasis added).

In actions brought in the name of a personal representative under statutes requiring him to bring the action for the benefit of certain persons, he is generally considered to be a merely nominal party, having no interest in the case for himself or the estate that he represents. 22A Am Jur 2d, Death, § 408, p. 435. Neither the administrator nor the estate of the decedent has any interest in, or right to, the benefit of any judgment that may be recovered in a wrongful death action; the real party in interest is the next of kin, as beneficiary, *McDavid v. Fiscar,* 97 N.E.2d 587 (Ill.App.___), 342 Ill. App. 673. In an action to recover damage for wrongful death, the real party in interest is the beneficiary under the statute, not the administrator. *Re: Estate of Ives,* 102 S.E. 2d 807, 248 N.C. 176, 72 ALR 2d 278.

Idaho, as well, requires that every action shall be prosecuted in the name of the real party in interest. I.R.C.P. 17(a). The real party in interest in the initial complaint was the decedent's estate, and were it not for holdings of our Supreme Court that actions in breach of contract founded upon breaches in performance of a professional service contract are tort actions, that complaint would have alleged a cause of action, with damages appropriate to that cause of action, which lies in favor of an estate, i.e., an action for breach of contract.

Plaintiff's counsel also argues that when counsel for the Valley Vista Care defendants orally asserted in an argument before the United States District Court words to the effect that "plaintiff has a valid action for wrongful death already pending in the Idaho state court" such conceded, presumably by judicial admission, the fact of a sufficient pleading in this court. This would not serve to create the pleading of a cause of action in this court where no such cause of action had thus far been pled.

Where the original complaint does not give notice of the legal theory in an amended complaint, the amendment is a new cause of action which does not relate back. *Wing v. Martin*, 107 Idaho 267, 688 P.2d 1172 (1984). Defendants newly named in a complaint which was amended after the statute of limitations had run against them may be subject to a relation back to the time of an early, timely filed complaint provided they have some kind of notice or reason to know that an action has been instituted against them before the statute runs. *Hoopes v. Deere & Co.*, 117 Idaho 386, 788 P.2d 201 (1990).

Similarly, a plaintiff joining the fray as a brand new party to a brand new cause of action by way of an amended complaint is then and there commencing that new action by the filing of the amended complaint. If the statute of limitation applicable to the cause of action has run, and is pled as a defense, that cause of action is time-barred.

While I.R.C.P. 17(a) provides that an "executor, administrator, personal representative, guardian, conservator . . . or a party authorized by statute may sue in this capacity *without joining the party for whose benefit the action*

is brought . . . " (emphasis added), the plain language of this rule militates against any interpretation that a personal representative bringing an action *on behalf of the estate,* seeking damages awardable only to the estate or, mistakenly, to the decedent if he had lived to bring it himself, has not brought an action for the heirs as being those persons "for whose benefit the action was brought." As already observed, the real plaintiff in the first complaint was the decedent's estate, while the plaintiffs in the proposed second amended complaint would be decedent's heirs. The fact that Alfred Hayward, the Personal Representative of decedent's estate, is also an heir, will not operate to effect a relation back because he was suing there as the representative of the estate in an action not brought on his personal behalf.

For these reasons, the Motion for Leave to File the Second Amended Complaint should be *denied,* and, for the above reasons and as orally pronounced in open court, the motion to reconsider is *denied* as to all claims against the moving defendants. Counsel for such defendants will please submit an appropriate order for execution and entry.

IT IS SO ORDERED.

ENTERED this 6th day of October, 1999.

/s/ Craig C. Kosonen
CRAIG C. KOSONEN,
District Judge

I hereby certify a true correct and [sic] copy of the foregoing was mailed, postage prepaid, this 7th day of October, 1999, to the following:

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ALL DISTRICT COURT JUDGES – 10-6-99 B.J.

KAY SATHER, Clerk of Court

By: /s/ Connie Port
Deputy Clerk

APPENDIX M

IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR
THE COUNTY OF BENEWAH

ALFRED S. HAYWARD, PERSONAL REPRESENTATIVE OF THE ESTATE OF DELBERT LEWIS HAYWARD, DECEASED,

Plaintiff,

vs.

VALLEY VISTA CARE CORPORATION, a non-profit corporation, d/b/a VALLEY VISTA CARE CENTER, SCOTT F. BURPEE and JAN BURPEE; JACK'S PHARMACY INCORPORATED; JACK BOTTS; CHAD BROWN and NANCY RENFREW, JERROLD E. PARK and RICHARD K. THURSTON, M.D., Co-Personal Representatives of the ESTATE OF W. DYCE THURSTON, M.D.,

Defendants.

CASE NO. CV-97-00065

MEMORANDUM OPINION AND ORDER

(Filed Oct. 15, 1999)

The defendants Jack's Pharmacy, Incorporated, Jack Botts, and Chad Brown (The Jack's Pharmacy defendants) have moved for summary judgment of dismissal on the ground that there is no duty in the law running from defendants and in favor of plaintiff's decedent, and there being no duty there can be no breach thereof. Defendants have presented expert opinion that (1) there is no duty beyond that which the Jack's Pharmacy defendants undertook, and (2) such acts were within the standard of care. Plaintiffs have countered with expert opinion that there is such a duty and defendants have breached it.

This, of course, describes a contested issue of material fact, a resolution of which this Court may not undertake in a summary judgment proceeding.

Not formally argued, however, but noticeable by the Court as the law of the case, is the inherent infirmity in plaintiff's suit against the Jack's Pharmacy defendants which the Court found fatal in plaintiff's suit against the Valley Vista defendants, i.e., this is an action for professional negligence, or malpractice, and such a cause of action is personal to the patient and does not survive his or her death. *See, the Court's Memorandum Opinion and Order in Re: Summary Judgment* previously filed herein. Accordingly,

IT IS HEREBY ORDERED that this action be dismissed as to defendants Jack's Pharmacy Incorporated, Jack Botts, and Chad Brown.

ENTERED this 14th day of October, 1999.

/s/ Craig C. Kosonen
CRAIG C. KOSONEN,
District Judge

I hereby certify a true correct and copy of the foregoing was mailed, postage prepaid, this 15th day of October, 1999, to the following:

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ALL DISTRICT COURT JUDGES

KAY SATHER, Clerk of Court

By: /s/ _____
Deputy Clerk

APPENDIX N

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IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE
COUNTY OF BENEWAH

ALFRED S. HAYWARD, Personal Representative of the Estate of Delbert Lewis Hayward, deceased, Plaintiff, and VALLEY VISTA CARE CORPORATION, a non-profit corporation, d/b/a VALLEY VISTA CARE CENTER, SCOTT F. BURPEE and JAN BURPEE; JACK'S PHARMACY INCORPORATED; JACK BOTTS; CHAD BROWN and NANCY RENFREW,	NO. CV 97-00065 ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT AND DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION (Filed Oct. 20, 1999)

JERROLD E. PARK and)
RICHARD K.)
THURSTON, M.D., Co-)
Personal Representatives)
of the Estate of W. Dyce)
Thurston, M.D.,)
)
Defendants.)
)

IT IS HEREBY ORDERED that Plaintiff's Motion for Leave to File the Second Amended Complaint to include Wrongful Death cause of action and Plaintiff's Motion for Reconsideration is **DENIED**, as to all claims against Defendants, Valley Vista Care Corporation, a non-profit corporation, d/b/a Valley Vista Care Center, Scott F. Burpee and Jan Burpee, and Nancy Renfrew, and Defendants, Jerrold E. Park and Richard K. Thurston, M.D., Co-Personal Representatives of the Estate of W. Dyce Thurston, M.D. The motions are **DENIED** for the reasons set forth in this Court's October 7, 1999, Memorandum Opinion and Order Re: Motion for Reconsideration, and as orally pronounced in open court, at the hearing on this matter conducted August 20, 1999.

The Summary Judgment of Dismissal of the above-described Defendant's, entered June 24, 1999, is therefore affirmed. That judgment is a final judgment as to the above-described Defendants, and execution and appeal may be taken thereon, all as set forth by this Court's Certificate of Appeal, filed October 5, 1999.

ENTERED THIS 19th day of October, 1999.

/s/ Craig C. Kosonen
HONORABLE
CRAIG C. KOSONEN

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of October, 1999, true and correct copies of the foregoing deposited in the United States Mail at Coeur d'Alene, Idaho, postage prepaid, addressed to:

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CLERK OF COURT

/s/ _____

APPENDIX O

IN THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO

IN AND FOR THE COUNTY OF BENEWAH

ALFRED S. HAYWARD, Personal Representative of the Estate of Delbert Lewis Hayward, Deceased, Plaintiff, vs. VALLEY VISTA CARE CORPORATION, a non-profit corporation, d/b/a Valley Vista Care Center, SCOTT F. BURPEE and JAN BURPEE; JACK'S PHARMACY INCORPORATED; JACK BOTTS; CHAD BROWN; NANCY RENFREW, JERROLD E. PARK and RICHARD K. THURSTON, M.D., Co-Personal Representatives of the Estate of Dyce W. Thurston, M.D. Defendants.	CIVIL NO. CV-97-00065 JUDGMENT (Filed Nov. 1, 1999)

There having come on for hearing before the undersigned, Craig C. Kosonen, District Judge, and the Court having rendered its Memorandum Opinion and Order

herein on the 14th day of October, 1999, now makes and enters herein the following Judgment:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff, Alfred S. Hayward, Personal Representative of the Estate of Delbert Lewis Hayward, Deceased, shall recover nothing herein against the defendants, Jack Botts, Chad Brown and Jack's Pharmacy Incorporated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Amended Complaint of the plaintiff herein be, the same is hereby dismissed and that this action is dismissed as to the defendants, Jack Botts, Chad Brown and Jack's Pharmacy Incorporated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants Jack Botts, Chad Brown and Jack's Pharmacy Incorporated do have and recover herein, pursuant to the provisions of Rule 54(d)(1), Idaho Rules of Civil Procedure, their costs and expenses herein in the amount of $_____.

DATED this 29th day of October, 1999.

/s/ Craig C. Kosonen
Craig C. Kosonen
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of ~~October~~ November, 1999, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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KAY SATHER
CLERK OF THE
DISTRICT COURT

By: _____
DEPUTY